

IN THE UNITED STATES DISTRICT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

FRIENDS OF GEORGE'S, INC.,

Plaintiff,

vs.

NO. 2:23-cv-02163-TLP

THE STATE OF TENNESSEE; BILL LEE,
in his official and individual
capacity as Governor of Tennessee;
JONATHAN SKRMETTI, in his official and
individual capacity as the Attorney
General of Tennessee,

Defendants.

ORAL ARGUMENT HEARING

BEFORE THE HONORABLE THOMAS L. PARKER

Thursday

30th of March, 2023

CANDACE S. COVEY, RDR, CRR
OFFICIAL REPORTER
FOURTH FLOOR FEDERAL BUILDING
MEMPHIS, TENNESSEE 38103

1 A P P E A R A N C E S

2

3 Appearing on behalf of the Plaintiff:

4

5 MR. BRICE TIMMONS
6 MS. MELISSA STEWART
7 MR. CRAIG EDGINGTON
8 Donati Law, PLLC
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10 Memphis, TN 38104

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12 Appearing on behalf of the Defendants:

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14 MR. JAMES NEWSOM, III
15 MR. ROBERT WILSON
16 MR. STEVEN GRIFFIN
17 Office of the Tennessee Attorney General
18 40 South Main Street
19 Suite 1014
20 Memphis, TN 38103

21

22 Also Present:

23

24 MR. STEVEN MULROY
25 MS. JESSICA INDINGARO

1 Thursday

2 March 30, 2023

3 The Oral Argument hearing in this case began on this
4 date, Thursday, 30th day of March, 2023, at 3:30 p.m., when
5 and where evidence was introduced and proceedings were had as
6 follows:

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9 **THE COURT:** Good afternoon. This is in the
10 matter of Friends of George's, Incorporated against the State
11 of Tennessee and Jonathan Skrmetti. And then I believe we've
12 got a second one, Friends of George's, Incorporated versus
13 Steven J. Mulroy.

14 Do we have someone here from the district
15 attorney's office?

16 **MR. MULROY:** Your Honor.

17 **THE COURT:** Oh, Mr. Mulroy.

18 **MR. MULROY:** Yes. Good afternoon.

19 **THE COURT:** Good afternoon.

20 **MR. MULROY:** With me is, for counsel, Jessica
21 Indingaro from my office as well.

22 **THE COURT:** Very good. Good afternoon.

23 **MS. INDINGARO:** Good afternoon.

24 **THE COURT:** All right. The plaintiffs are
25 seeking a TRO. So why don't I hear from you.

1 **MR. TIMMONS:** Your Honor, as a preliminary
2 matter, I think we're technically here on a preliminary
3 injunction because everybody has notice, and everybody is
4 here. So there isn't an issue of a lack of notice that would
5 place the limits of a TRO on this hearing. That said, we'll
6 get to the meat of it because the standards are basically the
7 same.

8 But about the law that we are dealing with here
9 today, the challenge statute. Every year for decades now,
10 our community has been host to an event that celebrates the
11 Tennessee values of inclusion, diversity and taking pride and
12 joy in our community. And at that festival every year for
13 many years now, you would find female impersonators, men in
14 women's attire. The entertainment ranges from the family
15 friendly to sometimes the downright raunchy.

16 Every year this event includes performances that
17 include what would fall under the statute in question as
18 simulated sexual acts and frankly, simply perverse behavior
19 that is certainly not appropriate for young children and some
20 would argue not even for 17-year-olds.

21 Some people even believe that these performances
22 are intended to groom and recruit children to the lifestyle
23 that this event promotes. I speak, of course, of -- if we
24 can. That's it. The Memphis international barbecue
25 festival's Miss Piggy Idol.

1 Every single one of these performers -- and then
2 if you'll look here, some of them are pretty bad -- are
3 engaging in precisely the type of -- that one is particularly
4 awful -- are engaging in a type of conduct that would be
5 swept up in Tennessee Code Annotated 7-51-1407, the statute
6 that the State of Tennessee seeks to implement this Saturday.
7 It would render Miss Piggy Idol as it has historically been
8 conducted criminal. And would probably put a big damper on
9 barbecue fest this year.

10 Now, we all know that that's not what the
11 legislature intended, and that's kind of the point. What the
12 legislature did intend is to criminalize exactly the conduct
13 seen at Miss Piggy Idol when it is performed by a specific
14 group of speakers, and that is to say drag queens.

15 The statute is not content neutral. It's
16 viewpoint discriminatory, and as my previous example
17 demonstrates, it's vague and overbroad. All statutes that
18 are content -- that are not content neutral and that are
19 viewpoint discriminatory are presumptively unconstitutional
20 under *Reed versus the Town of Gilbert*.

21 Every case I'm going to cite today is a United
22 States Supreme Court case. None of this is limited to the
23 Sixth Circuit, and none of it is particularly nuanced. So
24 far the government has made virtually no defense to the
25 statute itself, and they focus solely on issues of standing,

1 immunity and redressability.

2 Standing is, of course, the first question the
3 Court has to answer. But in the First Amendment context,
4 that's easy. For nearly the entire modern history of First
5 Amendment jurisprudence, the Supreme Court has recognized
6 that any individual may make a facial challenge to a speech
7 regulation. And even where the facial challenge fails, an
8 as-applied challenge could still be brought by an
9 organization consisting of and representing performers whose
10 conduct might be criminalized by the statute.

11 Friends of George's is such an organization. It
12 consists of performers and the production crew of drag shows,
13 that is to say, male and female impersonators. Their
14 performances or performances that they might wish to put on
15 are due to their status as male and female impersonators,
16 either intrinsically criminalized by the statute under one
17 reading or subjected to far broader regulation and enhanced
18 punishments under another reading of the statute. Both of
19 those interpretations are constitutionally impermissible.

20 If Friends of George's does not have standing to
21 challenge this statute, then courts would necessarily have to
22 wait for an as-applied challenge to take up any facial
23 challenge. And the entire history of First Amendment
24 jurisprudence tells us that is not the case. Our briefs cite
25 three key precedents on this point: Broadrick versus

1 Oklahoma. Dombrowski versus Pfister. And Secretary of
2 Maryland versus Joseph H. Munson Company.

3 All of these cases state unequivocally that
4 facial challenge of this nature may be brought by anyone at
5 all. And Munson Company delves into why an organization like
6 Friends of George's would have standing to bring suit under
7 the third party standing doctrine of *jus tertii* standing.
8 Even if the standard proposed by the government today is, in
9 fact, the correct standard.

10 So Friends of George's is the proper plaintiff.
11 And that brings us to the question of who is the proper
12 defendant. We've addressed those issues in our briefs, but
13 in short, we are going to concede today that the state itself
14 is not subject to Eleventh Amendment abrogation under this
15 legal theory and consent to its dismissal. The Sixth Circuit
16 decided a case in 2022 that if it didn't hold that exactly,
17 it was very, very close to doing so.

18 **THE COURT:** So can we say good-bye to half the
19 lawyers in this room?

20 **MR. TIMMONS:** Unfortunately, I don't know if you
21 can say good-bye to any of the lawyers in this room because
22 that's just the State of Tennessee itself.

23 **THE COURT:** I see. Okay.

24 **MR. TIMMONS:** The governor -- and to be clear
25 state officials are stripped of their immunity under *Ex parte*

1 Young. And the single best discussion of Ex parte Young that
2 I've seen in the Sixth Circuit recently is the one that ends
3 up in a case cited and relied on most heavily by the
4 defendants, the Universal Life Church case cited in their
5 briefs. We've also included reference to it in ours.

6 The case deals specifically with the immunity
7 of -- and justiciability issues related to the governor, the
8 attorney general and district attorneys in the State of
9 Tennessee in their official and individual capacities. It's
10 essentially dispositive, except for one small detail.

11 That case was not a facial challenge to an
12 overbroad statute that sought to regulate speech. And as a
13 result of that, I think the prudential concerns that relate
14 to the justiciability issues as to the governor and the
15 attorney general would be similar to the prudential concerns
16 that I just discussed for the purposes of standing.

17 And so here, the governor has made public
18 statements, and we've cited to them directly in our briefs
19 and filed the news articles in which they're quoted. That
20 would lead a reasonable person to believe that he will use
21 his power to command state-level law enforcement agencies in
22 Tennessee to enforce Section 1407, the challenge statute.

23 **THE COURT:** What power does he have to do that?
24 I didn't see a citation to any examples or any statute or
25 constitutional...

1 **MR. TIMMONS:** Well --

2 **THE COURT:** Help me with that. Go ahead.

3 **MR. TIMMONS:** Sorry. So he is the -- it falls
4 under his take care power. But he does command the state
5 police forces, the Tennessee Bureau of Investigation, the
6 Tennessee Highway Patrol. He appoints them and he directs
7 them and can issue executive orders relative to them. The
8 fact that he has said that this specific statute is one that
9 he wants to see enforced would lead one to believe reasonably
10 that he might enforce it. And a credible threat of
11 enforcement is the legal standard. Again, that's in the
12 Universal Life Church case. It's discussed at great length.
13 And that case there was no reason to believe that the
14 governor would have anything to do with that. Here, he's
15 made public statements about this specific act.

16 The attorney general and district attorney
17 general now share dual and divided responsibility for
18 enforcement of the state's criminal statutes. If the
19 district attorney general doesn't enforce the statute
20 categorically, the duty falls to the attorney general to seek
21 the appointment of a prosecutor pro temp. And he continues
22 to bear responsibility for that statute's enforcement at the
23 trial level in those cases. And he always has enforcement
24 power at the appellate level.

25 So either the attorney general, the district

1 attorney general or both are a proper defendant in this case,
2 depending on the positions taken by the district attorney.
3 So it's a mixed question of fact and law which of them is the
4 proper defendant. The same prudential concerns as I
5 mentioned would apply here to the justiciability questions
6 related to the defendants as would apply to the standing
7 analysis.

8 But in any event then, the collateral litigation
9 filed, which was admittedly filed in response to the state's
10 briefing last night. District Attorney General Mulroy is the
11 official charged with enforcement of the statute at the trial
12 court level. And the analysis in Universal Life Church of
13 the likelihood of enforcement, the threat of enforcement
14 applies here too.

15 He has not -- District Attorney General Mulroy
16 has not disavowed the statute's constitutionality formally.
17 Just as in that case, he has the constitutional and statutory
18 obligation to enforce the statutes of the State of Tennessee.

19 Unlike in other jurisdictions where district
20 attorneys general have given categorical assurances that they
21 won't enforce certain laws that they deem unconstitutional.
22 District Attorney Mulroy has consistently taken the position
23 that he won't give any categorical assurances about not
24 enforcing any statute duly enacted by the legislature. He's
25 said that every time he's been asked about any statute. And

1 he said that here as well. And I think it's simply the fact
2 that he understands his constitutional obligation to be to
3 enforce the laws of the State of Tennessee, not to make the
4 laws of the State of Tennessee.

5 And the district attorney's office of Shelby
6 County does have a long track record of prosecuting both
7 criminal and nuisance cases under the adult-oriented business
8 statutes that Section 1407 purports to incorporate by
9 reference. You'll find all of those factors are the elements
10 that the Sixth Circuit relied on in the Universal Life Church
11 case that is at issue here.

12 Okay. Now, turning to the substance of the
13 statute itself, the legislature has sought to regulate a
14 subcategory of speech, based on the speaker's identity and
15 the content of the speech itself. This is no different from
16 a public university choosing to only regulate political
17 speech made by conservative professors or to prohibit
18 only theatrical productions put on by blue-haired women's
19 studies majors. You can't regulate a subcategory of speech
20 based on who the speaker is and what their viewpoints might
21 be.

22 The fact that the government claims that the
23 speech in question is harmful or even specifically harmful to
24 children does not save it from strict scrutiny under the
25 Supreme Court's holding in Reno versus the ACLU. Speech we

1 don't like is still subject to First Amendment protection
2 because we cannot defend the right of honest, reasonable
3 discourse among citizens to debate political, social,
4 artistic and scientific issues of importance by waiting until
5 on idea or speaker that the majority agrees is important is
6 attacked.

7 H. L. Mencken said, "The trouble with fighting
8 for human freedom is that one spends most of one's time
9 defending scoundrels. For it is against scoundrels that
10 oppressive laws are first aimed, and oppression must be
11 stopped at the beginning if it is to be stopped at all."
12 Friends of George's are not scoundrels. Not even remotely.

13 But in order to ensure their right to expression
14 is protected, they are forced to defend the rights of people
15 that the legislature would seek to paint as scoundrels.
16 People that it claims that are engaging in performances
17 harmful to children. The state has for many decades now
18 successfully protected children from the types of sexual
19 content that this statute purports to regulate through a
20 narrowly tailored scheme of obscenity statutes,
21 adult-oriented business regulations and indecent exposure
22 laws. This statutory scheme has been so successful that when
23 asked by a reporter for an example of what HB9 was protecting
24 children from, Governor Lee could not name one single
25 incident.

1 That alone should let the Court know that
2 enjoining this statute from taking effect pending a trial on
3 the merits will work no harm to anyone. But it will mitigate
4 the disastrous chilling affect that has made performers
5 ranging from drag troops to Nashville professional musicians
6 uncertain of whether their performances are crimes, if they
7 are done in any place that a person who is 17 years old and
8 364 days might view them, even if that person has parental
9 accompaniment, parental consent. Even if it's viewed
10 accidentally and even without the performer engaging in any
11 commercial activity at all. All of those factors I just
12 mentioned and more are the types of narrow tailoring present
13 in the adult-oriented business statute that 7-51-1407
14 purports to reference for its definition of harmful to
15 minors.

16 Plaintiffs take issue with aspects of that
17 definition, which has never been challenged in federal court.
18 But by removing it from the context of constitutionally sound
19 time, place and manner restrictions, the narrow tailoring to
20 ensure that the rights of parents are protected, its
21 limitation to commercial activity. In this case the
22 legislature has gone too far and swept up constitutionally
23 protected expressive activity.

24 The statute lacks this type of careful tailoring
25 because it is, after all, a political stunt. And it's the

1 most dangerous kind of stunt. It's a stunt that will harm
2 the unwary bystander. It was not carefully planned.

3 The legislature made no legislative findings to
4 determine how children were not adequately protected by the
5 existing statutory scheme. And thus they cannot
6 demonstrate -- and it is their burden to demonstrate this.
7 They cannot demonstrate that this protects a compelling
8 governmental interest. That's the first step they have to
9 take.

10 But then they have to show under Reno versus the
11 ACLU and Ashcroft versus the ACLU, both statutes which dealt
12 with Congress's faltering efforts to regulate Internet
13 pornography that they've got to show that these -- that the
14 statute they are enacting is superior to the statutes that
15 already exist. They've got to demonstrate the compelling
16 government interest. And then they've got to show how the
17 statutes they're enacting are more narrowly tailored than the
18 ones that already exist or conversely, why those narrowly
19 tailored statutes that are already on the books don't do the
20 job sufficiently.

21 And we know they can't do that because they
22 didn't even bother to do the legislative legwork to
23 demonstrate that this was necessary at all. The bill's
24 sponsor made clear what they really wanted to regulate.
25 Representative Chris Todd stated over and over on the House

1 floor and in the media to anyone who would listen that he was
2 trying to criminalize conduct like that which had been
3 proposed in his district, which is Jackson, last year. And
4 that was a drag show featuring performers in full-length
5 dresses and gowns doing vetted musical and comedy content
6 that would be appropriate for all ages. He specifically
7 stated that drag content was never appropriate for children.
8 That it could not be appropriate for children.

9 The bill's Senate sponsor also referenced a drag
10 show at Tennessee Tech as the type of conduct that would be
11 prohibited. And that likewise fell completely and
12 unambiguously within the realm of constitutionally protected
13 speech. Now, apparently somebody suggested that it might be
14 a problem that they were sweeping all of this First Amendment
15 protected content up into their definition of harmful to
16 minors content.

17 So when asked on the House floor at the very end
18 of the debates whether the regulation would prohibit
19 family-friendly drag shows. Asked specifically about
20 family-friendly drag shows, he then declined to answer,
21 stating that it was not up to him, the bill's primary author
22 and sponsor, to say what kind of conduct the bill prohibited.
23 If he doesn't know, no one can. And that was precisely the
24 point. The bill is designed to chill the speech of drag
25 performers anywhere and everywhere that is not in the back of

1 a dark, smoky bar with blacked-out windows, which is the only
2 place that the bill sponsors imagine drag performers belong
3 at all.

4 If this bill does not criminalize all
5 performances by male and female impersonators, which is one
6 perfectly plausible reading of this statute, its purpose is
7 to be so ambiguous that it would create a kind of
8 self-censorship that the First Amendment prevents them from
9 achieving through direct legislation.

10 Fortunately, the First Amendment prohibits that
11 too because the Supreme Court has been clear that a
12 government may not regulate speech in a manner that is not
13 content neutral. It may not regulate speech in a non
14 content-neutral manner, even if that speech would otherwise
15 be unprotected by the First Amendment. Specifically
16 including obscenity and true threats. And we'll get to that
17 in detail in a second.

18 I do want to emphasize that this speech is
19 protected by the First Amendment because it is not defined
20 narrowly within the confines of true obscenity. And it
21 doesn't make any reference to true threats, and it further --
22 it excises it from the realm of commercial speech, which is
23 another category of potentially less protected speech.

24 So by putting this regulation in place that could
25 follow people into their homes or in private events, anywhere

1 that a minor might see, they've stripped it of that category
2 of -- well, they have restored the First Amendment to that
3 category of protection rather than stripping it because it's
4 not commercial speech anymore.

5 It no longer merely applies to obscenity because
6 obscenity is a test that applies to the world at large.
7 There is no obscenity test just for minors. There is a
8 compelling government interest in protecting minors from
9 obscenity. But when you start regulating speech that is
10 inappropriate only for minors, and that's what the definition
11 of harmful to minors does, you've now moved into the realm of
12 speech that is not, *per se*, obscenity. And it's got to be
13 narrowly tailored.

14 And it's not as though the legislature doesn't
15 know how to do that. They've done it with the adult-oriented
16 business statutes. They've done it with obscenity statutes.
17 They've done it with indecent exposure statutes.

18 So emphasizing that this speech is protected by
19 the First Amendment, I want to go back to addressing those
20 outer limits where speech isn't even protected by the First
21 Amendment. In *R.A.V. versus City of St. Paul*, the court
22 addressed itself to a case involving a burning of a cross on
23 the lawn of an African-American family. And in its very
24 detailed analysis, in a majority opinion written by Justice
25 Scalia, the court delved into the regulation of speech of

1 non First Amendment protected speech on a content and
2 viewpoint discriminatory basis.

3 R.A.V. stands for the proposition that states may
4 only regulate subcategories of otherwise prescribable speech
5 when it does so without reference to the content of the
6 speech itself or the viewpoint expressed in the speech.
7 Justice White wrote a concurrence in R.A.V., and he accused
8 the majority in that case of creating a doctrine of
9 underinclusiveness. Essentially he said that, of course, we
10 all get what overbreadth is and why we don't want to regulate
11 speech in an overbroad fashion because you might sweep up
12 protected speech. But what's the problem, he says, with
13 regulating only subcategories of unprotected speech? Hate
14 speech is so noxious, he said that we ought to be able to
15 regulate it when it rises to the level of true threat.

16 Justice Scalia had some particularly sound
17 retorts to that point. He said writing for the majority he
18 rejected that characterization. Said the majority and the
19 majority reason that governments may regulate those subsets
20 of speech, insofar as they're regulating something like the
21 medium in which that speech is conveyed, say speech over a
22 telephone versus speech through the mail.

23 And they can regulate subsets of speech when they
24 apply to, say, different categories of businesses. But there
25 are some limits, and they are all related to the viewpoint

1 and the content of the speech. A myriad of examples. I'm
2 just going to read these as direct quotes because I don't
3 think I can do any better.

4 These are direct quotes from the majority
5 opinion. *Quote*, A state might choose to prohibit only that
6 obscenity which is the most patently offensive in its
7 prurience, i.e., that which involves the most lascivious
8 displays of sexual activity. But it may not prohibit, for
9 example, only that obscenity which includes offensive
10 political messages.

11 This is the next quote. The federal government
12 can criminalize only those threats of violence that are
13 directed against the president, since the reasons why threats
14 of violence are outside the First Amendment, protecting
15 individuals from the fear of violence, from the disruption
16 that fear engenders and from the possibility that the threat
17 and violence will occur have a special force when they are
18 applied to the person of the president.

19 But the federal government may not criminalize
20 only those threats the president -- against the president
21 that mention his policy on aid to inner cities. And to take
22 a final example, this is a direct quote, one mentioned by
23 Justice Stevens. A state may choose to regulate price
24 advertising in one industry but not in others because of the
25 risk of fraud. One of the characteristics of commercial

1 speech that justifies depriving it of full First Amendment
2 protection is in its view greater there. But a state may not
3 prohibit only that commercial advertising that depicts men in
4 a demeaning fashion. Likewise, the state may not
5 discriminate between types of speech that depict men in
6 dresses. The statute is unconstitutional, and this Court
7 should enjoin it from taking effect pending further hearings
8 on this matter.

9 **THE COURT:** All right. Thank you, Mr. Timmons.
10 I left something in my office. So give me one minute. I'll
11 be right back.

12 (Break.)

13 **THE COURT:** It seems to me that Mr. Newsom, I
14 suppose, from your team, we should hear from you. But might
15 make more sense to hear from Mr. Mulroy's office to see if
16 they're ready to take a position on this statute.

17 **MR. NEWSOM:** Yes, Your Honor.

18 **THE COURT:** All right.

19 **MR. MULROY:** Thank you, Your Honor. Good
20 afternoon.

21 **THE COURT:** Good afternoon.

22 **MR. MULROY:** Steven Mulroy, district attorney for
23 the 30th Judicial District, Shelby County. I want to make
24 clear today that I am representing myself in my individual
25 capacity, and I was informed by the attorney general earlier

1 that they are representing me in my official capacity. For
2 purposes of this hearing, I will take them at their word.

3 I only want to speak to one matter today, Your
4 Honor. The only matter that I think has to be decided today
5 is whether a TRO should be entered. I just want to make
6 clear on behalf of -- I will not oppose the entry of a TRO.
7 I am aware of the fact that there is -- and I was just
8 served, by the way, in this matter. So there are limits to
9 what I am prepared to talk about.

10 But I am prepared to say that I don't oppose the
11 TRO. I am aware of the fact that there is great uncertainty
12 and great concern among the people in Shelby County regarding
13 the scope, the applicability, the validity of the statute.

14 And I believe that it would be useful, for my
15 purposes anyway, to get that uncertainty resolved. Regarding
16 the exact scope and applicability and validity of the
17 statute, it would be useful to have it resolved before I make
18 any decisions regarding enforcement. I understand that this
19 Court may end up deciding that the statute is completely
20 valid, completely invalid, partially invalid and may apply a
21 narrowing construction or a clarifying construction, any of
22 which would be useful for me to know before I begin to
23 enforce the statute.

24 I will just say this, that it strikes me that
25 without taking any definitive position regarding the

1 constitutionality of the statute, certainly there are some
2 nontrivial issues here. And certainly with respect to the
3 balance of harms factor and the public interest factor, I
4 would say that they weigh in favor of granting the TRO. And
5 that's really all I'm prepared to say this afternoon, Your
6 Honor, having just been served today.

7 **THE COURT:** All right. Thank you, Mr. Mulroy.

8 **MR. MULROY:** Thank you, Your Honor.

9 **THE COURT:** So Mr. Newsom, based on that, I take
10 it you are representing him in his official capacity.

11 **MR. NEWSOM:** That's my understanding, Your Honor.
12 Yes.

13 **THE COURT:** Well, it's either you or him. I'll
14 take you that you're going to -- yes, sir.

15 **MR. MULROY:** If I could simply to that point, you
16 know, I was just served today. I was informed by Mr. Newsom
17 that under the applicable statute, they basically would
18 represent me in my official capacity, even if I didn't want
19 that to happen. I've looked at the statutory language. I
20 don't think it's crystal clear. I haven't had a chance to
21 research it, but certainly for purposes of this hearing today
22 and this hearing today only, I'm happy to say that Mr. Newsom
23 knows more than I about that. And so since I was able to
24 speak in my individual capacity, I think I've made my
25 position clear.

1 **THE COURT:** Yes, sir.

2 **MR. MULROY:** Thank you.

3 **THE COURT:** All right. Yes, sir. Mr. Newsom?

4 **MR. NEWSOM:** I appreciate General Mulroy's
5 statements. He's most gracious. That is our interpretation
6 of the statute that when a Tennessee official is sued in his
7 official capacity, there's a nondelegable duty on the part of
8 the attorney general's office to represent that state
9 official, that being District Attorney General Mulroy in this
10 instance.

11 Your Honor, I take it from my friend Mr. Timmons'
12 remarks that he has no proof to put on today?

13 **MR. TIMMONS:** We filed a number of declarations
14 earlier today, inclusive of -- and the Court has copies
15 apparently.

16 **MR. NEWSOM:** I should be more clear about that.
17 Any live proof today?

18 **MR. TIMMONS:** I am able to put on some live proof
19 relative to those declarations, if the Court would like.
20 Given the late hour and the short fuse on this, I sort of
21 assumed that the Court would want to see initial proof today
22 and would likely set a later hearing that would be more
23 in-depth and substantive after everybody had a chance to
24 brief the matter more fully. I am prepared to go forward
25 either way.

1 **MR. NEWSOM:** I'll address my remarks to the
2 Court, of course. We're here today on a prescheduled hearing
3 on the Friends of George's versus State of Tennessee Docket
4 Number 2163, Your Honor. I may say for the record that I
5 have with me Robert Wilson and Steven Griffin with the Office
6 of the Tennessee Attorney General.

7 **THE COURT:** Yes, sir.

8 **MR. NEWSOM:** And it's our delight to represent
9 the State in this case today.

10 Preliminarily, I will say that my friend
11 Mr. Timmons has a broad view of the statute, which the State
12 does not share. As a matter of fact, the case of Miller
13 versus California from which is -- from which much of the
14 statutory language is drawn in this instance makes it clear
15 that obscene material is not protected by the First
16 Amendment. And while my mother may wish to wash my mouth
17 out, I may go into a bit of what the statutory language says
18 that would advise the Court that the acts that are prohibited
19 to be done as harmful to minors in their presence are obscene
20 acts, which are well within the government's power to
21 regulate, Your Honor.

22 Let me first take up some of the issues that
23 relate to standing in regard to the first case.

24 **THE COURT:** Now real quick.

25 **MR. NEWSOM:** Yes, Your Honor.

1 **THE COURT:** I'm sorry. When you say that Miller
2 versus California, that this statute follows Miller versus
3 California, is that when it references Tennessee's Obscenity
4 Statute 39-17-901?

5 **MR. NEWSOM:** In part, yes, Your Honor. Because
6 as we look at the statute that has been enacted by the
7 legislature but is not yet in effect, there are various
8 borrowing provisions in the statute that refer to other
9 provisions of Tennessee statutes that precede the enactment
10 of this statute. So when you take all those together as a
11 piece, you see the conduct that the statute intends to
12 regulate.

13 **THE COURT:** Yes, sir.

14 **MR. NEWSOM:** And taking all that together, there
15 has been no statement by Mr. Timmons nor is there any proof
16 in the record that indicates that the performers of the
17 Friends of George's intend to undertake acts that would
18 violate the statute. And so Your Honor, while one might talk
19 about Miss Piggy all day long, we don't view Miss Piggy as
20 being in violation of the statute, even if it goes into
21 effect if she were to appear at the barbecue festival. And
22 so there are the harms that are being proposed by the
23 plaintiff here, we think are not existent as far as the
24 statute is concerned.

25 The statute makes it an offense for a person to

1 perform adult cabaret entertainment, either on public
2 property or in a location where the adult cabaret
3 entertainment could be viewed by a person who is not an
4 adult. Adult cabaret entertainment, for purposes of the
5 statute, is defined as a single or multiple adult-oriented
6 performances that are harmful to minors as that term is
7 defined in 39-17-901 and that feature topless dancers, go-go
8 dancers, exotic dancers, strippers, male or female
9 impersonators or similar entertainers. A performance is
10 harmful to minors where the quality of any description or
11 representation in whatever form of nudity, sexual excitement,
12 sexual conduct, excess violence or sado-masochistic abuse
13 would be found by the average person applying contemporary
14 community standards to appeal predominantly to the prurient,
15 shameful or morbid interests of minors. Is patently
16 offensive to prevailing statutes -- standards in the adult --

17 **THE COURT:** Mr. Newsom, what are you reading from
18 right now?

19 **MR. NEWSOM:** This is from the statute itself from
20 2003 public chapter Number 2, if Your Honor has that before
21 you. And as a matter of fact, I might, if I could use -- do
22 you still call it the Elmo?

23 **THE COURT:** We do. And we use it every day.

24 **MR. NEWSOM:** Go there and we can walk through
25 this, Your Honor, because I think it would be helpful to the

1 Court. I may need some coaching on this.

2 **THE COURT:** It's pretty self-explanatory.

3 **MR. NEWSOM:** We're going to zoom it up a little
4 bit. That's the wrong way. All right.

5 So the statutory language is -- and should I have
6 my -- you can hear me, I'm sure.

7 **THE COURT:** Yes, sir. There's a microphone.
8 That gray bar up here on the podium right there is a
9 microphone.

10 **MR. NEWSOM:** Great.

11 **THE COURT:** You're good.

12 **MR. NEWSOM:** So this statute will become part of
13 7-51-1401, of course, if the Court allows it to go into
14 effect. And as I was saying, adult cabaret entertainment
15 means adult-oriented performances that are harmful to minors
16 as that term is defined in 39-17-901. And if we turn to --

17 **THE COURT:** Right. And that's the statute that
18 goes back to the Miller versus California standard.

19 **MR. NEWSOM:** Correct. Yes, Your Honor.

20 **THE COURT:** Okay.

21 **MR. NEWSOM:** And so if we go there, we talk about
22 nudity by showing the human male or female genitals, pubic
23 area or buttocks with less than a fully opaque covering. And
24 let me -- just so I can display that. Do you want me to
25 display that, or would that be helpful to the Court?

1 **THE COURT:** No. I thought that's what you were
2 reading from.

3 **MR. NEWSOM:** Correct.

4 **THE COURT:** Because I was reading along with
5 7-51-1401, and the obscenity statute covers quite a bit.

6 **MR. NEWSOM:** Yes, it does.

7 **THE COURT:** You were about to read all the
8 different ways --

9 **MR. NEWSOM:** And I don't think you need that,
10 Your Honor.

11 **THE COURT:** I would rather you didn't. But the
12 reason I'm asking you this question is because I was struck
13 by how scientific the verbiage was. And it covers what it
14 covers, right?

15 **MR. NEWSOM:** Correct.

16 **THE COURT:** As they say at the Supreme Court,
17 you'll know it when you see it.

18 **MR. NEWSOM:** That's right. And what one of the
19 sponsors of the legislation may have said or wanted but
20 didn't end up in the language of the statute is really of no
21 moment to the Court.

22 **THE COURT:** But my question is really, so why do
23 we need this statute? If what you were about to read covers
24 what it covers, why do you need to then go in and talk about
25 what this statute covers?

1 **MR. NEWSOM:** Because, Your Honor, the legislative
2 intent is that this applies to a circumstance in which minors
3 are exposed to that conduct.

4 **THE COURT:** Well, you just said we didn't need to
5 worry about the legislative intent.

6 **MR. NEWSOM:** Well, it's -- I'm sorry.

7 **THE COURT:** But I guess my question called for
8 it, but go ahead.

9 **MR. NEWSOM:** The legislative intent as reflected
10 in the statute is certainly something that this Court should
11 consider.

12 **THE COURT:** Okay. All right. But some would
13 argue that obscenity as defined already --

14 **MR. NEWSOM:** Yes.

15 **THE COURT:** -- protects minors, doesn't it?

16 **MR. NEWSOM:** Certainly you could make that
17 argument. I think that it does. And I wouldn't shirk from
18 that, but I think that --

19 **THE COURT:** So what else does this statute cover
20 that obscenity doesn't cover?

21 **MR. NEWSOM:** Your Honor, it's right on -- nothing
22 really. But it's not broad as my friend Mr. Timmons would
23 like to describe it so as to -- as he does not tell us by way
24 of any proof that he has put in the record that there is a
25 performer who is associated with Friends of George's who

1 intends to include these aspects as a portion of their
2 performance or their entertainment.

3 So Your Honor, going back to the question of
4 standing, and if I may retreat back to my other position.

5 **THE COURT:** Sure.

6 **MR. NEWSOM:** That would be easier on me. That we
7 really do have a circumstance in which a TRO would be
8 inappropriate because the plaintiffs have failed to show a
9 likelihood of success on the merits in that a plaintiff who
10 cannot demonstrate that standing is present is not in a
11 position to come in and ask this federal court to provide
12 relief.

13 **THE COURT:** And you're saying they don't -- they
14 lack standing because there's no one that's part of the
15 Friends of George's that plans to put on any obscene
16 material?

17 **MR. NEWSOM:** There's no injury in fact, as the
18 language of the cases say, that's concrete and
19 particularized. That's actual or imminent and not
20 conjectural or hypothetical and that's in Spokeo as
21 referenced in our brief and other cases as well. The
22 threatened injury to be an injury in fact must be certainly
23 impending to constitute injury in fact. And allegations of
24 possible future injury are not sufficient.

25 **THE COURT:** Well, and that may hold true,

1 Mr. Newsom, but this is a criminal statute. I mean, you
2 know, so we're just supposed to eat the mushrooms and wait to
3 find out if they're poisonous or not?

4 **MR. NEWSOM:** No, Your Honor.

5 **THE COURT:** Is that the approach?

6 **MR. NEWSOM:** Well, there's -- I cannot come in
7 and ask this Court for an advisory opinion with regard to any
8 claim that I have that's purely conjectural and doesn't pose
9 to me a likelihood of injury in fact. The complaint is
10 almost devoid of factual allegations by which there's any
11 assertion that the production set to begin on April the 14th
12 or in fact any other performance will involve adult cabaret
13 entertainment that involves these aspects that we've been
14 discussing, nudity, sexual excitement, sexual conduct, excess
15 violence or masochistic or sado-masochistic abuse, as those
16 terms are defined in the statute. Nor, Your Honor, even if
17 the plaintiff had asserted a proper injury, those injuries
18 are not fairly traceable, of course, to the governor or the
19 attorney general, who Mr. Timmons wishes to keep on as
20 defendants in this matter.

21 Of course, DA Mulroy has the ability to enforce
22 the statute, and as Mr. Timmons had indicated, has the duty
23 to enforce the statute should there be a violation of the
24 statute, apart from his personal misgivings about the
25 constitutionality of the statute, we would assert. And

1 finally, there is no redressability. The plaintiff must
2 plead facts sufficient to establish that the Court is capable
3 of providing relief that would redress the alleged injury.

4 Here the plaintiff has not shown that it has an
5 injury fairly traceable to the governor or to the attorney
6 general. And no remedy applicable to those defendants, be it
7 an injunction or a declaration, would redress their alleged
8 injuries. Now, Your Honor, with regard to General Mulroy --
9 and, of course, when this matter was set, we all -- all we
10 had on our plate was the original lawsuit.

11 The second lawsuit was filed this morning.
12 And -- but we assert, Your Honor, that there is no basis on
13 which even naming DA Mulroy gives this Court a basis on which
14 to find that there is standing for the reasons that I've
15 mentioned previously. And that even the addition of General
16 Mulroy to this case does not get them over the line because
17 this statute regulates, as we've discussed, obscene conduct
18 that is not protected by the First Amendment.

19 Your Honor, the plaintiff also asserts that First
20 Amendment challenges are subject to a different set of
21 prudential concerns, and thus a different test for standing
22 applies because they contend that the statute is overbroad in
23 their regulation. They rely mostly on Secretary of State of
24 Maryland versus Joseph H. Munson Company for the proposition
25 that any party sufficiently concerned with the chilling

1 effect that a speech regulation might have may challenge the
2 speech.

3 But to the extent that plaintiff claims that it
4 does not have to show Article III standing, that is
5 incorrect. The Sixth Circuit in *Prime Media, Incorporated*
6 versus *City of Brentwood*, 485 F.3d 343, it's a 2007 Sixth
7 Circuit case concluded that no plaintiff can litigate a case
8 in federal court without establishing constitutional standing
9 under Article III. And that is an injury that is fairly
10 traceable to the defendant's allegedly unlawful conduct, and
11 that is likely to be redressed by the requested relief.

12 Overbreadth challenges allow a plaintiff to
13 attack the constitutionality of a law, not because of their
14 own rights of free expression but because the law's very
15 existence may cause others to restrain -- refrain from
16 constitutionally protected speech or expression. Overbreadth
17 challenges are an exception to the prudential standing
18 requirement that a party may only assert a violation of its
19 own rights. And because overbreadth creates an exception
20 only to the prudential standing inquiry, the Supreme Court
21 has made clear that the injury in fact requirement still
22 applies to overbreadth claims under the First Amendment.

23 So Your Honor, since plaintiff has not
24 established an injury in fact or for that matter traceability
25 or redressability against the state, the governor -- well,

1 they've admitted with regard to the state, the governor, the
2 attorney general, the plaintiff under these circumstances
3 also lacks standing, Your Honor.

4 **THE COURT:** All right. Thank you, Mr. Newsom.

5 Give me one second. We have a jury that's been
6 deliberating so let me find out. They knocked on the door.

7 **MR. NEWSOM:** Yes, Your Honor.

8 (Short break.)

9 **THE COURT:** All right. So Mr. Timmons.

10 **MR. TIMMONS:** Yes, Your Honor.

11 **THE COURT:** Why don't I hear your response?
12 Unless -- I didn't know if there's anybody else that needed.

13 **MR. NEWSOM:** Your Honor, I'm sorry. I was not
14 quite through.

15 **THE COURT:** Oh, okay.

16 **MR. NEWSOM:** That's fine.

17 **THE COURT:** Well, when you sat down, I thought --
18 all right.

19 **MR. NEWSOM:** Sorry.

20 **THE COURT:** Fire away, Mr. Newsom. Sorry. I
21 didn't mean to cut you off.

22 **MR. NEWSOM:** Well, thank you.

23 I will say, Your Honor, I think that we've heard
24 from Mr. Timmons that perhaps this is also a preliminary
25 injunction hearing and perhaps it's not. I would take the

1 position that this is not a preliminary injunction hearing
2 and the matter that is before the Court relates to the TRO
3 and agree with District Attorney General Mulroy on that
4 point, Your Honor.

5 **THE COURT:** Okay. Anything else?

6 **MR. NEWSOM:** No, that's it.

7 **THE COURT:** All right. Mr. Timmons, I'll hear
8 your response, and then what I would like to do is maybe take
9 a short break, collect my thoughts. Y'all have given me a
10 lot to think about, and I'm sure I have some questions that I
11 want to ask you. But I need to think about it first. All
12 right.

13 Yes, sir, Mr. Timmons?

14 **MR. TIMMONS:** We'll take -- one of the lovely
15 things about litigating these things with such little notice
16 is that we all learn about new cases that the others are
17 going to rely on as we go. And so to that end, I've only
18 just had the opportunity to read as much of the Sixth Circuit
19 case Prime Media versus City of Brentwood, on which
20 Mr. Newsom just relied as I can. And I think the Court
21 really just hit the nail on the head right out of the gate
22 when you said this is a criminal statute. That's a media
23 licensing statute. The issue there was whether -- something
24 to do with height limits. And something to do with -- this
25 is not a criminal statute at all.

1 This has to do with whether somebody can obtain a
2 license. And if they haven't tried to apply for the license
3 or they're not affected by a licensing statute, then the case
4 law on civil First Amendment issues is with Mr. Newsom. But
5 the Broadrick court didn't mince words. And it doesn't just
6 talk about prudential standing. It does talk about
7 prudential considerations in the case.

8 But it says and I quote, As a corollary the court
9 has altered its traditional rules of standing to permit in
10 the First Amendment arena attacks on overly broad statutes
11 with no requirement that the person making the attack
12 demonstrate that his own conduct could not be regulated by a
13 statute drawn with a requisite narrow specificity.

14 Litigants, therefore, are permitted to challenge
15 a statute not because their own rights of free expression are
16 violated but because of a judicial prediction or assumption
17 that the statute's very existence may cause others not before
18 the court to refrain from constitutionally protected speech
19 or expression.

20 And to be clear, Friends of George's represents a
21 group of male and female impersonators. Their conduct is
22 potentially regulated by the statute because they're going to
23 have to conform their conduct to the statute. Now, what does
24 that mean? Mr. Newsom says they haven't indicated that
25 they're going to put on -- they haven't put on evidence that

1 they intend to violate the statute.

2 Well, I don't know what the statute means. I
3 spent two hours on the phone with a Baker Donelson attorney
4 this afternoon representing a theater organization who
5 described themselves as having to draft a "choose your own
6 adventure" flowchart to figure out what it means. When I
7 looked at the performances from Miss Piggy, I was convinced
8 that just about every photo I saw either came close to or
9 did, in fact, violate the statute. But Mr. Newsom doesn't
10 think so.

11 The statute is not narrowly tailored. It is
12 vague. It is overbroad. And it is presumptively
13 unconstitutional. That's another point I want to come back
14 to. It is the burden of the state to demonstrate that the
15 challenge statute is constitutional, not the other way
16 around.

17 **THE COURT:** And you're saying that because it's a
18 content.

19 **MR. TIMMONS:** Because it's content-based statute.
20 Now, there is a field -- there is a strain of legal thought
21 that obscenity is not unprotected speech, but that it is not
22 speech and is therefore unprotected. I wouldn't call that
23 anything close to a settled question of law.

24 But I want to go address the Miller analysis.
25 The Miller analysis, Miller versus California is not specific

1 to minors. It is about regulating conduct and what is fit
2 for adults. The only case that -- and it still is, to some
3 degree, good law.

4 But the Ginsberg case that predates Miller by
5 five years is the case that says we can regulate minors
6 differently than we can adults. But Miller comes after that.
7 And it says what obscenity is is -- and it provides the
8 familiar three-prong test.

9 Every case after that to rely on Miller and
10 Ginsberg to address speech relative to minors and the two key
11 cases are Reno versus ACLU and Ashcroft versus ACLU. Every
12 one of those cases and all their progeny rely on strict
13 scrutiny standard. They say this is content-based speech.
14 We're going to analyze it under the strict scrutiny non
15 content-neutral framework.

16 So the government can't save the statute just by
17 saying well, let's incorporate most of Miller and make a
18 little tweak we like. And then well, that's close enough to
19 obscenity to save it.

20 Actually the Supreme Court had a great quote on
21 this if I can find it here. Yeah. Reno versus the ACLU, the
22 government really put this pretty succinctly. The government
23 may not reduce the adult population to only what is fit for
24 children. Regardless of the strength of the government's
25 interest in protecting children, the level of discourse

1 reaching a mailbox simply cannot be limited to that which
2 would be suitable for a sandbox. I think we all know -- I
3 know it's a euphemism, but I think we all know that children
4 check the mail.

5 And so if the government's response to that is
6 well, we're saying you have to take this conduct and put it
7 somewhere where a minor can't possibly see it. That's not a
8 reasonable restriction. That's not narrowly tailored, and
9 it's ambiguous. What does that mean? Does that mean my
10 house? What if somebody -- what if I'm --

11 **THE COURT:** Is that your primary issue with it?
12 The fact that it says that the performance can't be either in
13 public or in a location where the adult cabaret entertainment
14 could be viewed by a person who is not an adult?

15 **MR. TIMMONS:** That's one of the major issues with
16 it. I don't know that I have a primary argument about this
17 statute because there are so many to choose from. But the
18 fact that it is extremely vague as to where this could take
19 place is hugely problematic. But it's by design. It's by
20 design. The statute is intended to again, force people back
21 to places where there's no possibility that children could
22 see this.

23 But we do take issue with the content
24 restrictions themselves as well and those definitions. If
25 you limit those definitions to adult-oriented businesses that

1 are much more specifically defined, then perhaps they
2 survive. But that's part of the narrow tailoring. That's
3 part of the narrow tailoring analysis.

4 And every single one of those issues that I
5 mentioned, whether it's commercial speech, the precise nature
6 in which it is regulated, you know, the strictness of the
7 time, place and manner restrictions and the parental consent
8 issue. The issue of whether parental consent is an
9 affirmative defense, which it is in our existing
10 adult-oriented business statutes. And those issues are all
11 explicitly discussed in the analysis in Reno and come up
12 again in Ashcroft.

13 Let's talk about the injury in fact issue very
14 quickly. I do understand that the state takes issue with our
15 view that Broadrick is sufficient to get us through the door
16 to the courthouse. In *Elrod versus Burns*, which I haven't
17 cited anywhere, so it is 427 U.S. 347, 1976. Right after
18 *Miller*. A year after *Miller*, I think. The Supreme Court
19 held that the deprivation of a First Amendment right
20 constituted an injury in fact and that it was sufficient
21 injury to establish irreparable injury for the purposes of
22 injunctive relief. When the government passes a criminal
23 statute that quashes everybody's speech, we don't all have to
24 go out and say I intend to engage in this speech and then
25 before I can go to court and do it. I'm sorry. Go to court

1 and argue that I should be able to do it.

2 Let's see. We've talked about presumptive and
3 constitutionality.

4 **THE COURT:** Mr. Timmons?

5 **MR. TIMMONS:** Yes.

6 **THE COURT:** I would ask you to pause for a
7 moment.

8 (Short break.)

9 **THE COURT:** All right. Mr. Timmons, sorry about
10 that.

11 **MR. TIMMONS:** No problem at all, Your Honor. I
12 appreciate a moment to gather my thoughts. I mentioned a
13 moment ago that the government -- because this is a
14 presumptively unconstitutional statute, the government has to
15 show a compelling government interest. It can't just list
16 protecting children, you know, as a set of magic words to get
17 around that issue. It's got to demonstrate how those
18 children are going to be harmed. And the state just conceded
19 to you that this statute doesn't cover anything that wasn't
20 already illegal. The statute does nothing according to the
21 government.

22 **THE COURT:** So what are you afraid of?

23 **MR. TIMMONS:** Well, I'm afraid the statute does
24 do quite a bit. I'm afraid that it, first of all, heightens
25 the penalty available from a misdemeanor to a felony for

1 someone in one of those protected categories. I'm sorry, not
2 one of those. Described categories of speakers. A male or
3 female impersonator who violates that statute is subject to a
4 misdemeanor on the first arrest but felonies for everyone
5 after that.

6 So now we're talking about depriving people of
7 their right to vote. Branding them infamous because they
8 belong to a particular category of speaker. And they're
9 going to violate -- when they violate a statute that they
10 admit is redundant and only applies to these specific
11 categories of speakers. Actually a moment ago you asked me
12 what was my biggest -- I think my biggest problem with this
13 statute. That's it.

14 **THE COURT:** Yeah. Okay.

15 **MR. TIMMONS:** That's it. We're talking about
16 turning people into felons because they belong to a specific
17 category of speaker and they violate a statute that is
18 essentially already on the books and applies at a lower
19 standard to everybody else. That's the one that personally
20 offends me. And I think it's also one of the most compelling
21 arguments.

22 But the state just told you that this statute
23 doesn't cover anything that wasn't already illegal. If
24 that's actually true and if that's what the state intended,
25 you know, when I taught civil rights and constitutional law,

1 that's the example I used for helping students understand
2 what a lack of legitimate governmental interest was. Let
3 alone a compelling governmental interest. Passing a law that
4 they claim does nothing is -- deprives them of a compelling
5 governmental interest almost certainly. They have the
6 obligation to show why this statute is necessary under Reno,
7 and they can't even -- they don't have any evidence to
8 support it, and they can't even answer the question.

9 Now, Mr. Newsom also indicated that it was not
10 relevant what the bill sponsor said. There are differing
11 schools of thought on statutory interpretation. That's fair.
12 I personally lean a little textualist. I don't think
13 legislative bodies do a great job of agreeing on what
14 everything means.

15 However, when we're talking about this type of
16 law that's directed at a specific group of people and that is
17 directed at a category of speech, Supreme Court precedence --
18 and I'm quoting from Reed versus Town of Gilbert. Supreme
19 Court "precedents have also recognized a separate and
20 additional category of laws that, though facially content
21 neutral, will be considered content-based regulations of
22 speech; laws that cannot be justified without reference to
23 the content of the regulated speech or that were adopted by
24 the government because of disagreement with the message that
25 the speech conveys. Those laws, like those that are content

1 based on their face, must also satisfy strict scrutiny."

2 Briefly on the issue of who the right defendant
3 is, I just want to say that our absolute best position when
4 it comes to standing or when it comes to who the right
5 defendant is rather, is the district attorney. And it is
6 because of the Sixth Circuit case on which the state relies
7 heavily. The Universal Life Church case goes into a deep
8 analysis of why district attorneys are proper parties to laws
9 like this that have not yet been enforced.

10 But it also goes a little bit deeper into the
11 analysis under *Ex parte Young*. And I can't recall if I said
12 this earlier or not, but *Ex parte Young* -- and I think
13 everybody who spends a lot of time doing this field of work
14 gets a little frustrated with the idea that it is a
15 complicated legal fiction. It is a complicated legal
16 fiction.

17 The dissent in *Ex parte Young* points out that
18 really this is all about suing the government over what laws
19 are constitutional. And this distinction between individual
20 capacity or official capacity is very cerebral and academic
21 but not practical. But that's the dissent, and that's not
22 the law.

23 *Ex parte Young* describes the mantle of the state
24 being on a government actor, and it describes when you move
25 into the realm of constitutionally violative statutes because

1 a state can't authorize those. It says that that person is
2 then stripped of that mantle and then acts only in their
3 capacity as an ordinary person, their individual capacity.

4 And so the individual capacity claim against the
5 district attorney general is the claim that is most valid
6 here. And I think when you review the Universal Life Church
7 case, you'll see that that's not merely still a good law, but
8 it's the analysis with regard to this specific group of
9 district attorneys, Tennessee district attorneys general that
10 the Sixth Circuit has already applied.

11 I do want to say one last thing about the
12 vagueness of this law because I somehow didn't work this in
13 previously. The definition section that Mr. Newsom showed
14 you earlier that defines content harmful to minors, it also
15 defines community for the purposes of the community standards
16 test.

17 I was kind of blown away because Miller is pretty
18 clear that the community can be the state. Miller versus
19 California, the jury instruction in Miller made the -- was to
20 tell the jury apply the community standards of the State of
21 California. That was challenged by the -- by Miller on the
22 grounds that a national standard was appropriate. And the
23 Court ultimately said now, you apply a community standard to
24 two parts of the analysis, but federal judges retain the
25 power to apply national standard to what has legitimate

1 artistic, political, social or scientific value. The State
2 of Tennessee however, chose to balkanize this statute even
3 further and defined community as the judicial district in
4 which the allegations -- or the criminal act is alleged to
5 have occurred.

6 Citizens of Shelby County and the members of
7 Friends of George's and Friends of George's itself in general
8 have no notice of where in the state they can travel and
9 perform their art and what they're allowed to do in each
10 judicial district, unless they go do some sort of a public
11 opinion survey about the community standards in that
12 particular judicial district. This is a statewide statute
13 with 32 different definitions, according to the face of the
14 statute. And I cannot find any case on point on that issue,
15 but that seems to me to be intrinsically vague. It certainly
16 does not put these individuals, these actors on notice of
17 what's illegal wherever they go.

18 And unless the Court has any questions, I believe
19 I've used too much of your time today.

20 **THE COURT:** Actually, you haven't.

21 Yes, sir, Mr. Mulroy?

22 **MR. MULROY:** Your Honor, just very quickly, I
23 have to speak at a community forum in a little while, so when
24 you retire, it may be that I will also retire, and
25 Ms. Indingaro will remain, with your permission.

1 **THE COURT:** Yes, sir. That's fine with me, if
2 she's prepared to answer any questions. And I don't know
3 that I would have any for you in particular. But Mr. Newsom
4 has got your back as far as your official capacity is
5 concerned. So all right. Thank you.

6 **MR. MULROY:** Thank you, Your Honor.

7 **THE COURT:** Mr. Newsom, any quick response to
8 that before I step back?

9 **MR. NEWSOM:** No, Your Honor. Thank you.

10 **THE COURT:** Okay. Well, all right. Y'all give
11 me a few minutes, and I'll come back and either say good-bye
12 or ask some questions.

13 (Short break.)

14 **THE COURT:** All right.

15 **MR. NEWSOM:** Your Honor, if I may?

16 **THE COURT:** Yes, sir. You've got second
17 thoughts?

18 **MR. NEWSOM:** Well, I do. With the benefit of
19 younger minds, I would like to revise and extend my remarks
20 just a bit.

21 **THE COURT:** Sure. If you don't mind using the
22 microphone.

23 **MR. NEWSOM:** Your Honor, your question to me
24 during my presentation was what does this statute add that is
25 not in the previous acts. And I would point out to the Court

1 that it does add a time, place and manner aspect to the
2 statute that is not contained in the previous statutory
3 scheme.

4 **THE COURT:** Is that in a location where an adult
5 could be -- adult cabaret entertainment could be viewed by a
6 person who's not an adult?

7 **MR. NEWSOM:** Yes, Your Honor. Together with
8 public places as well. So I know that's belaboring the
9 obvious, but I didn't want to leave my poorly articulated
10 point standing --

11 **THE COURT:** Okay.

12 **MR. NEWSOM:** -- before the Court had the
13 opportunity to explore this further. Thank you, Your Honor.

14 **THE COURT:** Yes, sir.

15 So Mr. Timmons, I want to start with you, and
16 you've said this is -- strict scrutiny applies. It's a
17 content-based restriction. And it may be obvious to you, but
18 I just want you to tell me, you know, how does this regulate
19 content? What is it about the statute?

20 **MR. TIMMONS:** Do you want me to answer it from
21 here or are you going to?

22 **THE COURT:** It's completely up to you. There's a
23 microphone right in front of you. No, no, no. I mean that
24 gray bar right there is a microphone.

25 **MR. TIMMONS:** I guess I knew that. So there are

1 a couple of different ways. First of all -- so part of
2 viewpoint discrimination relates directly to the identity of
3 the performer. Ms. Stewart is going to find me the quote
4 here. Yeah. So this is Reed versus Town of Gilbert.
5 "Because speech restrictions based on the identity of the
6 speaker are all too often simply a means to control content,
7 the Supreme Court has insisted that laws favoring some
8 speakers over others demands strict scrutiny when the
9 legislature's speaker preference reflects their content
10 preference."

11 "Thus a law limiting the content of newspapers
12 but only newspapers could not evade strict scrutiny because
13 it could be characterized as speaker based. Likewise, a
14 content-based law that restricted the political speech of all
15 corporations would not become content neutral because it
16 singled out corporations as a class of speakers.
17 Characterizing a distinction as a speaker -- as speaker based
18 is only the beginning, not the end of the inquiry."

19 So here, we know, we know who the legislature was
20 targeting. They were very clear about it. And here, we've
21 got a category of speakers, male and female impersonators,
22 that for obvious reason -- I mean, reasons that I hope we
23 don't have to put on a lot of proof about to persuade
24 everybody of.

25 **THE COURT:** Well, but male and female

1 impersonators, that's already part of the Tennessee law under
2 these definitions, isn't it?

3 **MR. TIMMONS:** I mean, it wasn't -- this statute,
4 first of all, changes and broadens the regulation of that
5 statute. I did mention earlier, Your Honor, that we do take
6 issue with the constitutionality of that underlying
7 definition of harmful to minors. I just don't think it's
8 really pertinent to --

9 **THE COURT:** Well, so I'm looking at 7-51-1401,
10 and it references adult cabaret under the definition. And
11 within adult cabaret includes many of the same labels that
12 are in the statute that has recently been passed. So I guess
13 I'm just -- I'm asking you what about the statute that was
14 passed is aimed at a specific -- either specific content or a
15 specific speaker?

16 **MR. TIMMONS:** The existing definition of adult
17 cabaret, that regulates what businesses host. What materials
18 businesses put on the shelves. That regulates where
19 businesses can display lewd magazines or videos. Or
20 businesses can have performers. It doesn't regulate
21 performers. This takes those categories of performers that
22 are the subject matter of a regulation on businesses, and it
23 makes them the criminals.

24 **THE COURT:** Okay.

25 **MR. TIMMONS:** This eradicates the requirement

1 that the performance be compensated that exists in the
2 previous adult-oriented business statutes, and it says that
3 an individual person who does this -- who performs at all,
4 even just one time for no money, they're now the regulated
5 party, and they're now the criminal.

6 And they have been also deprived, I would -- and
7 this is crucial of the affirmative defense that exists in the
8 adult-oriented business and obscenity statutes of parental
9 consent. Remember Miller -- I'm sorry. Not Miller. Reno
10 doesn't create a sliding scale. Neither does Ginsberg
11 actually, predating Miller. There wasn't a sliding scale of,
12 say, content that's appropriate for minors who are three
13 versus content for minors that are 17 years and 364 days.
14 You're either a minor or you're not.

15 And so when we think about the appropriate minor,
16 we've got to talk about who we're excluding from any kind of
17 content that would run afoul of the statute. And that's
18 where parental consent becomes really important. And we
19 think about these sort of age-restrictive schemes in a kind
20 of, I think, common sense way because we're all used to
21 seeing it at the movie theater, right?

22 But movies, that's self-regulated. And if you've
23 got a parent with you and you're 17, you can go to that
24 R-rated movie. If you've got a parent with you and you're
25 13, you can go to that R-rated movie. And it's, again,

that's a self-imposed regulatory scheme by the industry.

The Communications Decency Act, this is out of Reno. The Communications Decency Act differs from the various laws and orders upheld in those cases in many ways including that it does not allow parents to consent to their children's use of restricted materials; it is not limited to commercial transactions; fails to provide any definition of indecent and omits any requirement that patently offensive material lacks socially redeeming value; neither limits its broad categorical prohibitions to particular times nor bases them on an evaluation by an agency familiar with the unique characteristics of the regulated material.

So have I answered Your Honor's question?

THE COURT: Yeah.

MR. TIMMONS: Okay.

THE COURT: I believe you have. Unless there are other reasons why you think it's content based, that it's a content-based restriction. The point I was getting at is you're saying strict scrutiny applies, presumptively unconstitutional. And I'm about to hear from Mr. Newsom about what he thinks about that. So I just wanted to understand why you think this statute applies to categories of content.

MR. TIMMONS: So two other points, and I think I can make them briefly. The first is that by taking the

1 definitions that were already extent in Tennessee law and
2 removing them from their context -- and, I mean, obviously
3 I've already talked about how it applies in different people.
4 It strips them out of their narrow tailoring.

5 So that by itself means this whole scheme has to
6 be subjected to strict scrutiny again. That statute might be
7 constitutional. I don't believe that that regulatory scheme
8 has ever been challenged in federal court. I think there is
9 a pre- --

10 **THE COURT:** When you say that statute, you're
11 talking about the adult-oriented establishments statutes.

12 **MR. TIMMONS:** Yeah. The section of the obscenity
13 Statute 39- -- the part in Title 39 that is cross-referenced
14 in 1407 is -- that statute has been tested only once to my
15 knowledge. It was pre Reno. And it was a state court case,
16 Tennessee Supreme Court case. Davis-Kidd Booksellers versus
17 McWherter. It's largely a case about the Tennessee
18 constitution. There is a sort of cursory First Amendment
19 analysis.

20 But it is completely -- it is in complete
21 conflict with the subsequent Reno analysis. And Ms. Stewart
22 has just pointed out some of this context that we're talking
23 about here. Gosh, I didn't even realize how -- this is the
24 State's burden under Title 39 Section 17-914.

25 "The state has the burden of proving that the

1 material" -- this is material that's harmful to minors -- "is
2 displayed. Material is not considered displayed under this
3 section if: (1) The material is placed in binder racks that
4 cover the lower two thirds of the material and the viewable
5 one third is not harmful to minors. Located at a height of
6 not less than five and one half feet from the floor." I
7 think we see who they're trying to protect there.
8 "Reasonable steps are taken to prevent minors from perusing
9 the material. The material is sealed, and if it contains
10 material on its cover that is harmful to minors, it must also
11 be opaquely wrapped. The material is placed out of sight
12 underneath the counter, or the material is located so that
13 the material is not open to view by minors and is located in
14 an area restricted to adults."

15 This list goes on and on for a couple of pages.
16 And that is the type of narrow tailoring that I am talking
17 about being stripped away from this and replaced with an area
18 where it can't be viewed by minors. And the State has to
19 prove all that. Now we have a -- the State says well, this
20 was in a place that was potentially viewed by minors. And
21 now the defendant is going to have to come forward and prove
22 that they had taken sufficient steps to prevent minors from
23 seeing it, I suppose. The statute isn't clear. It's vague.

24 **THE COURT:** Okay. Real quick. In *Reed versus*
25 *Town of Gilbert*, you gave an example of there's two ways we

1 get to strict scrutiny. One is if it's content-based
2 restriction. The other is if it seems to be content neutral
3 on its face, you can look to the legislative history and see
4 if they're trying to address content.

5 And my question to you is, is that part of the
6 opinion, or is that dicta from Reed versus Town of Gilbert?

7 **MR. TIMMONS:** So it's actually the Supreme Court
8 rejecting the appellate court's reasoning. So the section of
9 the statute says "The Court of Appeals and the United States
10 misunderstand our decision in Ward as suggesting that a
11 government's purpose is relevant even when a law is content
12 based on its face. That is incorrect. Ward had nothing to
13 say about facially content-based restrictions, because it
14 involved a facially content-neutral ban on the use, in a
15 city-owned music venue, of sound amplification systems not
16 provided by the city."

17 "In that context we looked to governmental
18 motive, including whether the government had regulated speech
19 because of disagreement with its message, and whether the
20 regulation was justified without reference to the content of
21 the speech." So the case whose holding that was is --

22 **THE COURT:** Ward.

23 **MR. TIMMONS:** Ward versus Rock Against Racism,
24 491 U.S. 781. And it forms a part of a basis for Reed's much
25 more recent reasoning.

1 **THE COURT:** I see. Okay. All right.

2 Mr. Newsom?

3 **MR. NEWSOM:** Yes, Your Honor.

4 **THE COURT:** You agree it's strict scrutiny?

5 **MR. NEWSOM:** No, Your Honor. We do not. In the
6 first instance the state's position, as I've articulated it,
7 is that what we're dealing with is obscene conduct. And as
8 much as my friend Mr. Timmons wants to generalize the conduct
9 at issue here, if we dig into the statute, the conduct that
10 is being regulated is indeed obscene. And I don't know if I
11 should hesitate to read that conduct before the Court.

12 **THE COURT:** Well, if you --

13 **MR. NEWSOM:** But I think the Court has got it,
14 certainly understands that when we dig into the statutory
15 language that the underlying conduct that is at issue is
16 certainly obscene. And just to pick out an example that is
17 not so lurid perhaps. Excessive violence under
18 TCA 39-17-901 4, "through the depiction of acts of violence
19 in such a graphic or bloody manner as to exceed common limits
20 of custom and candor or in such a manner that is apparent
21 that the predominant appeal of the portrayal is portrayal of
22 violence for violence's sake." Now, is that something, of
23 course, that is something that should be viewed by minors?
24 We suggest not. Certainly not by entertainers in a live
25 performance, Your Honor.

1 But to get to the question of if this conduct is
2 protected by the First Amendment, we would submit that the
3 Court should review the case of Entertainment Productions,
4 Incorporated versus Shelby County, 721 F.3d 729. It's a 2013
5 Sixth Circuit opinion in which the Court said, "We assess the
6 constitutionality of regulations that purport to ameliorate
7 the deleterious secondary effects of sexually oriented
8 establishments under the intermediate scrutiny standard
9 announced in City of Renton versus Playtime Theaters,
10 475 U.S. 41. According to Renton, content-neutral
11 regulations of the place -- time, place or manner of
12 protected expression are valid so long as they are designed
13 to serve a substantial governmental interest and do not
14 unreasonably limit alternative avenues of communication."

15 So Your Honor, we reject the argument that a
16 strict scrutiny standard would apply and would insist that if
17 this is not obscene conduct that's being regulated, that the
18 intermediate scrutiny standard articulated there would be the
19 applicable standard for the Court to utilize.

20 **THE COURT:** So is it your position then that it
21 is content neutral?

22 **MR. NEWSOM:** It is. It is.

23 **THE COURT:** What about Mr. Timmons' point that,
24 you know, you pull the -- you pull these definitions kind of
25 out from the regulatory framework that's already in place

1 that is, in his words, narrowly tailored to address the
2 concerns that you're articulating, and now we've just sort of
3 cobbled together this new statute, and we throw in anywhere a
4 minor might be -- well, in a location where the adult cabaret
5 entertainment could be viewed by a person who's not an adult.
6 I mean, that's anyplace, Mr. Newsom. I mean...

7 **MR. NEWSOM:** I'd like to take that on, as well as
8 one of the arguments that Mr. Timmons made earlier. And that
9 is that the legislature has an interest in regulating conduct
10 such as this. And, of course, we do insist that it's obscene
11 conduct that is performed in the presence of minors, either
12 recklessly or with intent, which is the language of the
13 statute.

14 And so it strikes us as not at all inappropriate
15 that the legislature would determine that that conduct as
16 regards to conduct that is done in the presence of minors is
17 conduct that is deserving of criminal sanction, including
18 misdemeanor and felony consequences, Your Honor. That that
19 is within the discretion of the legislature of the State of
20 Tennessee to regulate conduct that is obscene in nature.

21 **THE COURT:** Well, I still go back to my question.
22 If obscenity is sort of this umbrella category that's already
23 regulated, this statute, I don't know, I'm just trying to
24 understand what it would apply to, if not to the Miss Piggy
25 context or something along those lines. I mean, there are

1 kids running around the barbecue fest, right?

2 **MR. NEWSOM:** Well, of course there are, Your
3 Honor. But when you look at what the Miss -- of course the
4 Miss -- I think that what -- the State thinks that what
5 Mr. Timmons is arguing with regard to Miss Piggy is that this
6 is perhaps a cross-dresser. That is not conduct that is made
7 illegal under this statute.

8 This statute is much more pointed. And for
9 instance --

10 **THE COURT:** Well, I mean, it does include male or
11 female impersonators, doesn't it?

12 **MR. NEWSOM:** Oh, it does. But it includes male
13 or female impersonators who, for instance, are depicting acts
14 that are intended to result in sexual excitement, meaning the
15 condition of human male or female genitals when in a state of
16 sexual stimulation or arousal. Now, I haven't seen that at
17 the barbecue contest.

18 **THE COURT:** Well -- okay.

19 **MR. NEWSOM:** You can go down the line, and I
20 don't want to belabor the point with the Court, but these are
21 things that are not just a --

22 **THE COURT:** Well, my question -- I mean, you
23 know, the sponsor of this bill was concerned about what was
24 coming to Jackson, right? At least according to some of the
25 material we've received, there was concern about what amounts

1 to a drag show coming to Jackson. Well, those depictions,
2 although they were, you know, clearly comical from
3 Mr. Timmons, I mean, couldn't that be construed as a drag
4 show?

5 **MR. NEWSOM:** Your Honor, if the Court determines
6 that the legislative history is important to the Court's
7 decision, when going back and looking at the legislative
8 history, we'll see that the original sponsor of the bill was
9 informed by other legislators that his initial intent was not
10 something, of course, that the courts would accept. And
11 steered the sponsor back to look at the authorities that
12 provide guidance to the legislature in attempting to regulate
13 conduct. So the sponsor's original concept as perhaps
14 reflected by a lawsuit --

15 **THE COURT:** He should have kept his powder dry,
16 is that?

17 **MR. NEWSOM:** Well, you know, I'm sure I've said
18 things that I've lived to regret, Your Honor. But I think --

19 **THE COURT:** Not you.

20 **MR. NEWSOM:** -- when you look -- if you think
21 it's important to look at the legislative history in context,
22 I think what the Court is going to find is that the sponsor's
23 original idea was refined greatly before the statute was
24 enacted in the legislature.

25 **THE COURT:** Okay. All right.

1 Mr. Timmons, you've included the governor in your
2 lawsuit. As I understood Universal Life and I haven't
3 memorized it, but I think one of the things it said was that
4 the take care clause was not enough for federal jurisdiction
5 over the governor. So what basis is there for us to have the
6 governor in this case?

7 **MR. TIMMONS:** Your Honor, this is where I say
8 that those prudential concerns that apply only to free speech
9 cases that relate to overbreadth come into play. I think
10 that under that -- in any other First Amendment case, no
11 doubt, the governor's take care power is not sufficient.
12 However here, he's made statements that indicate a credible
13 threat of enforcement. And that he does have the power to do
14 it. And here we have those other prudential concerns.

15 Can I address two points Mr. Newsom made real
16 quick?

17 **THE COURT:** Sure.

18 **MR. TIMMONS:** I'm just going to go to cases that
19 he cited because there are some problems with those
20 citations. First, he quoted you the definition of excess
21 violence. That Davis-Kidd case that I mentioned earlier, one
22 of the very few things that the Court actually managed to do
23 in the Davis-Kidd case was hold that definition of excess
24 violence exceeded the scope of what was permissible to
25 regulate under the Miller test and was unconstitutional. So

1 just to be clear, that case, that part of the statute, that's
2 not what we're talking about here.

3 The second thing that Mr. Newsom relied on is the
4 case Entertainment Productions versus Shelby County, which
5 was about Shelby County's strip club regulations or rather,
6 the Tennessee statutory scheme on which Shelby County
7 predicated those. The problem with that is that the whole
8 case was about that context that I was talking about. It
9 goes to intermediate scrutiny because they're regulating the
10 ancillary effects of strip clubs.

11 When Mr. Newsom talked about ancillary effects,
12 that's not the direct effects of speech. That's the other
13 stuff that happens around strip clubs. Prostitution, drug
14 use, drug sales, violent crime, car break-ins. That's the
15 ancillary effects that cities and states have the power to
16 regulate when they talk about the location of strip clubs.
17 That's what lowers the scrutiny from strict to heightened,
18 and the context and the nature of the tailoring is what that
19 whole case was about. So you can't just say, well, once upon
20 a time, the Sixth Circuit looked at these definitions in a
21 totally different context and applied a different standard to
22 them.

23 And here's the language. This is some great
24 language from Entertainment Productions. It was made clear
25 that if an "adult entertainment sweeps in mainstream artistic

1 performances and if the presentation of a single performance
2 suffices to subject an establishment to the Tennessee act,
3 then the act applies to precisely the set of establishment
4 that doomed the statutes noted earlier." Doomed. That's the
5 Sixth Circuit, which were invalidated by this and other
6 circuit courts.

7 The statute at issue explicitly takes it from an
8 establishment that is an adult cabaret and says that an adult
9 cabaret performance is anything that anybody does that meets
10 these definitions in any place that could be viewed by a
11 minor one time. Even without compensation. I also do not --
12 Mr. Newsom said that there's a mens rea requirement of
13 recklessly here.

14 I don't have that section of the statute in front
15 of me, and I have to confess there have been so many versions
16 of this law that I get them confused sometimes. But I don't
17 recall there being a written intent or recklessness
18 requirement in the statute. And if the state's asking you to
19 imply one, then we're already out of the bounds of void for
20 vagueness.

21 **THE COURT:** Well, that raises a good point. I
22 want to make sure that I'm looking at the right version of
23 this law. I was looking at document -- it's -- in our docket
24 system it's Document 19-1. It's Exhibit A. Public chapter
25 Number 2. Senate bill Number 3.

1 **MR. NEWSOM:** That's it, Your Honor.

2 **THE COURT:** Okay. All right. So everybody
3 agrees that that's what I should be looking at. I didn't see
4 a mens rea in there either. What did I miss?

5 **MR. NEWSOM:** Excuse me just a second, Your
6 Honor --

7 **THE COURT:** Sure.

8 **MR. NEWSOM:** -- if I may.

9 Your Honor?

10 **THE COURT:** Here we go.

11 **MR. NEWSOM:** Sorry. The mens rea requirement is
12 contained in a more general statute, which is at
13 TCA 39-11-301(c). Where there's the requirement that an act
14 be performed intentionally, knowingly or recklessly. That's
15 the citation, Your Honor.

16 **THE COURT:** All right. And that's somehow tied
17 in with this statute?

18 **MR. NEWSOM:** Yes, Your Honor.

19 **THE COURT:** Okay. All right. All right.

20 Did you want to respond?

21 **MR. NEWSOM:** Just real briefly, Your Honor. Your
22 Honor asked the question about the governor. And I think
23 that this would apply to General Skrmetti as well. And the
24 law is that to establish redressability, a plaintiff must
25 plead facts sufficient to establish that the Court is capable

1 of providing relief that would redress the alleged injury.

2 And since plaintiff has not shown that it has an
3 injury fairly traceable to the governor or to the attorney
4 general, no remedy applicable to those defendants, be it an
5 injunction or a declaration, would redress plaintiff's
6 alleged injuries. And there I refer to the more recent case
7 of R.K. ex rel. J.K. versus Lee, which is 53 F.4th 995 at
8 1001.

9 **THE COURT:** While I've got you, you mentioned the
10 Entertainment Productions versus Shelby County.

11 **MR. NEWSOM:** Yes, Your Honor.

12 **THE COURT:** 721 F.3d and then I didn't get the
13 page number.

14 **MR. NEWSOM:** I apologize.

15 **THE COURT:** No, I just didn't write fast enough.
16 Go ahead.

17 **MR. NEWSOM:** It's 729, Your Honor.

18 **THE COURT:** Okay.

19 **MR. NEWSOM:** It's a 2013 case.

20 **THE COURT:** All right. Well, so I've got a lot
21 to think about. And I appreciate y'all's hard work and quick
22 response. And so you've given us a lot to chew on. I will
23 try to get an order out just as soon as humanly possible, and
24 then we'll take it from there. Okay?

25 **MR. NEWSOM:** Thank you, Your Honor.

1 **THE COURT:** Thanks everybody. Y'all have a good
2 rest of your evening.

3 (Adjournment.)

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C E R T I F I C A T E

I, CANDACE S. COVEY, do hereby certify that the foregoing 67 pages are, to the best of my knowledge, skill and abilities, a true and accurate transcript from my stenotype notes of the Oral Arguments hearing on the 30th day of March, 2023, in the matter of:

Friends of George's, Inc.

vs.

The State of Tennessee, et al.

Dated this 3rd day of April, 2023.

S/Candace S. Covey

CANDACE S. COVEY, LCR, RDR, CRR
Official court reporter
United States District Court
Western District of Tennessee